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APPENDIX E

Order entered in the *Cast Iron Pipe* cases, No. CA 71-516, in the Northern District of Alabama, on June 16, 1971 (Excerpt):

* * *

6. *Defendants' motion for order regarding communications to non-joined parties or potential parties.* Defendants' motion for an order regarding communications to non-joined parties is denied in part and granted in part, as follows: No retraction or corrective communication is due to be ordered at this stage regarding the past communications by the Attorneys General of Illinois and Pennsylvania—the effect of any improper solicitation or misleading advice can better be handled in notices under Rule 23 when the class action determinations have been made. All parties hereto are, however, hereby forbidden to communicate further (directly or indirectly, orally or in writing) with any potential claimant (whether as a member of a class under Rule 23 or as a subordinate agency or subdivision which may be by state law subject to representation by the Attorney General of such state) regarding any of the matters which may be involved in this litigation, without first having received the consent and approval of the proposed communication by order of the court. (A proposed communication shall be presented to the court in writing, with a designation or description of the proposed addressees and with a motion and proposed order for approval by the court, together with a certificate indicating the extent to which such communication has been examined by counsel for the other parties and effort made towards resolving objections thereto). This rule does not

forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed, or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which were not initiated by such office or agency and which do not have the effect of soliciting representation by counsel or misrepresenting the status, purposes or effect of the action and orders therein.

Order entered in *Moody* v. *Albemarle Paper Company*, Civil No. 989, in the Eastern District of North Carolina, on June 18, 1971:

In this case, as in all class actions, there exists the potential of abuse of the procedure, intentional and inadvertent, unless procedures are devised and employed to anticipate abuse. The judges of this court have under consideration an amendment to the local rules to guard against the potential abuses of the class action processes. Meanwhile, in order to avoid misunderstanding, the court on its own motion makes the following ruling with respect to the future conduct of counsel in this case, and it is

ORDERED:

All parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning this action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication by order of this court. Any such proposed communication shall be presented to this court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this court of the proposed communication. The communications forbidden include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out of the action under subparagraph (b)(3) of Rule 23; and (d) communications from counsel or a party which may tend to mis-

represent the status, purposes and effects of this class action, and of any actual or potential orders herein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, the courts, or the administration of justice. The obligations and prohibitions of this order are not exclusive, and all other ethical, legal and equitable obligations remain unaffected by the order. Neither does the order forbid communications between any attorney and his client, or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney.

Order entered in the *Gypsum* cases, No. 4614-A AJZ, in the Northern District of California, on June 25, 1971 (Excerpt):

* * *

19. All parties to these actions and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning any such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of this Court. Any such proposed communication shall be presented to this Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this Court of the proposed communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, of the Federal Rules of Civil Procedure; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or any administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.

This order does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

20. An Attorney General or his staff (not through private counsel whom the Attorney General may associate) may contact public agencies and municipalities within his state for which he has the statutory duty to represent or protect, but he may merely inform them of the pendency of the action in which he is counsel; that it relates to gypsum wallboard; that, if they have an interest which they feel justifies intervention, they may seek to intervene through their own counsel or through the Attorney General, in which event a full disclosure of any fee arrangements which the Attorney General may have or proposes to have shall be made. Such representation of any public agencies or municipalities by the Attorney General will not be approved by the Court until it has examined the contractual fee arrangement which they have agreed upon. Nothing in this order shall limit or change the duties of the Attorneys General or their staff.

* * *

Chicago Bar Association Committee Report, submitted to Chief Judge Robson of the U.S. District Court for the Northern District of Illinois, asserting the incurable unconstitutionality of Civil Rule 22, and referred to on page 21, footnote 1, of the Petition for Certiorari:

March 8, 1971

Mr. Harry D. Lavery, Chairman
Federal Civil Procedure Committee
c/o Berger, Newmark & Fenchel
10 South LaSalle Street
Chicago, Illinois 60603

Dear Mr. Lavery:

Re: Local Rule 22

In accordance with your letter of February 11, 1971, we have prepared a report setting forth the basis for our opinion that local Rule 22 is unconstitutional.

Local Rule 22 of the Civil Rules for the United States District Court for the Northern District of Illinois, promulgated April 15, 1970, provides as follows:

> "*Rule 22. For Prevention of Potential Abuse of Class Action.* In every action brought as a class action under Rule 23 of the Federal Rules of Civil Procedure, no communication concerning such action shall be made in any way by any of the parties thereto, or by their counsel, with any potential or actual class member, who is not a formal party to the action, until such time as an Order may be entered by the Court approving the communication.
> "Attorneys will be required to comply with the provisions of Rule 39 of the General Rules of this Court."

It appears that local Rule 22 was inspired by suggested local Rule 7 contained in the Manual for Complex and Multi-district Litigation. A copy of suggested local Rule

7, together with the explanation for the suggested rule contained in the Manual, is attached to this report as Exhibit A.

I

We believe that local Rule 22 is unconstitutional as an overly broad prior restraint on the First Amendment right to freedom of speech. In *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175 (1968), the Supreme Court summarized the law in this area as follows:

> "Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgment.
>
> "The Court has emphasized that '[a] system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'" (393 U.S. at 181.)
>
> "An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' [Citing case.] In other words, the order must be tailored as precisely as possible to the exact needs of the case." (393 U.S. at 183-84.)

In *Dorfman* v. *Meiszner*, 430 F. 2d 558 (7th Cir. 1970), our Seventh Circuit recently stated:

> ". . . in order to avoid a conflict between individual rights and the pursuit of valid government goals, restrictions on otherwise protected conduct must be drawn as narrowly as possible to conform to the 'letter and spirit' of the first amendment." (430 F. 2d at 562.)

The *Dorfman* case involved local Rule 34 of the General Rules, excluding photographers from certain portions of the Federal Building. The Seventh Circuit held that local Rule 34 was unconstitutionally overbroad and granted an injunction against the enforcement of the Rule as adopted. The Court stated that to impose a prior restraint by blanket rule "is inconsistent with both the letter and the spirit of the first amendment." (430 F. 2d at 563.)

In *Snyder* v. *Board of Trustees of University of Illinois,* 286 F. Supp. 927 (ND Ill. 1968), a three judge court invalidated a statute of the State of Illinois (the Clabaugh Act) prohibiting the use of facilities of the University of Illinois for the carrying on of certain types of activities by subversive, seditious and unAmerican organizations. The Court struck down the Clabaugh Act and issued a permanent injunction against its enforcement. The Court stated at page 934:

> "A statute purporting to regulate expression may not be so broad in its sweep as to hazard the loss or impairment of First Amendment freedoms by appearing to cover speech which may not constitutionally be regulated. Nor does it matter that the person challenging the validity of the statute might be subject to regulation under one more narrowly drafted."

Local Rule 22 seeks to prevent "potential abuses" of the class action device by a blanket rule that requires the District Judge in every class action to censor and approve (or disapprove), in advance, all communications with potential and actual class members. This approach seems to us to be both overbroad and unnecessary.

Any danger of unethical solicitation of business by lawyers can, we submit, be handled under existing ethical Canons. Canon 2 of the Illinois code of professional re-

sponsibility, as adopted on May 1, 1970, by the Board of Governors of the Illinois State Bar Association and by the Board of Managers of the Chicago Bar Association, covers the conduct of lawyers in soliciting employment with considerable precision. DR 2-104 provides as follows:

> "(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:
>
> * * *
>
> (5) If success in asserting rights or defense of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, *but shall not seek* employment from those contacted for the purpose of obtaining their joinder." (Emphasis added)

Two points would seem to follow from the foregoing Canon. First, the conduct of lawyers in connection with solicitation of business in class actions has already been regulated in specific terms, and any conduct by a lawyer in seeking employment has already been expressly prohibited. Secondly, the Canon has been drafted very narrowly and has been specifically limited to the conduct of members of the legal profession. Needless to say, it is no answer to the constitutional problem to argue that Local Rule 22 was adopted "merely to insure high professional standards and not to curtail free expression", *N.A.A.C.P.* v. *Button*, 371 U.S. 415. A court, no more than a state or any other governmental body, may, "under the guise of prohibiting professional misconduct, ignore constitutional rights", *N.A.A.C.P.* v. *Button*, supra, 439.

As to the risk that a communication may confuse or mislead class members, the solution that comports with our tradition would seem to be more speech, rather than

prior restraint. The curative communications could, if necessary, be supervised by the court in the particular case in which the problem arose. Express authority for this expression is contained in Rule 23(d) of the Federal Rules of Civil Procedure, which provides that in class actions the Court may make appropriate orders requiring, for the protection of the members of the class, or otherwise for the fair conduct of the action, that notice be given in such manner as the Court may direct to some or all of the members of the class at any stage in the action.

Even in a particular case, of course, any prior restraint on freedom of speech must be narrowly drafted, and based on specific findings. The Seventh Circuit has enumerated the proper standard in an unpublished order entered May 1, 1970, in the case of *Chase* v. *Robson* (No. 18424, page 3 of order):

> "We hold that before a trial court can limit defendants' and their attorneys' exercise of first amendment rights of freedom of speech, the record must contain sufficient specific findings by the trial court establishing that defendants' and their attorneys' conduct is 'a serious and imminent threat to the administration of justice.'"

The Court continued in *Chase* v. *Robson* (at pages 4-5 of the order) as follows:

> "Even in the presence of sufficient justification for curtailing certain first amendment utterances, an order must be drawn narrowly so as not to prohibit speech which will not have an effect on the fair administration of justice along with speech which will have such an effect."

In *Ginsberg* v. *City of Miami*, 307 F. Supp. 675 (S.D. Fla. 1969), the court stated at page 676:

> "Freedom of expression is a sacred constitutional right which the highest court in the land has constantly protected. [Citing case.] Speech may not be restrained in advance except when there is clear and unmistakable determination that the speaker will violate the law in the course of his speech."

It may be argued that under local Rule 22, every Judge in the Northern District would be a benign censor who would interpret the rule narrowly so as to permit all communications not clearly improper. The same argument was made—and rejected—by the Seventh Circuit in *Dorfman*, where the Court stated:

> "Although the Government offers a narrow interpretation of Rule 34 and argues that its enforcement would be limited to such interpretation, 'we cannot assume that, in subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights.'" (430 F. 2d 563 at n. 6.)

Utilization of court processes should not, and does not, justify a sweeping order preventing parties and their counsel from exercising their First Amendment rights free of prior governmental restraint. See *International Products Corp.* v. *Koons*, 325 F. 2d 403, 408 (2d Cir. 1963). Whatever power a trial judge may have in a given case to impose prior restrains [sic] on speech based on a particularized finding of need for such restraints in that case, it seems clearly unconstitutional to impose prior restraints by a blanket rule.

II

An additional question which has been raised by the Chairman's letter of February 11, 1971, referring this matter to our subcommittee, is whether there is a conflict between local Rule 22 and Rule 23 of the Federal Rules

of Civil Procedure. In view of our opinion that local Rule 22 is unconstitutional, we do not believe that it is necessary to take a position on the relationship between the two Rules.

We do wish to observe, however, that Rule 23 *requires* that notices be given to class members at various stages of a class action. Rule 23 is concerned with the danger of *lack* of communication with class members, whereas local Rule 22 is concerned with potential *abuses* in communication. The two Rules are concerned with quite different sets of problems, and we do not believe that local Rule 22 is in any way an implementation of Federal Rule 23.

III

In his letter of referral to this subcommittee, the Committee Chairman has requested an opinion as to whether modification of Rule 22 could correct the constitutional infringement referred to above. It is the conclusion of the subcommittee that the abuses, constituting an encroachment upon constitutionally guaranteed rights, cannot be corrected by employment of omitted language contained in Suggested Local Rule 7, or by modification of existing Rule 22. The same problems of overbreadth and prior restraint would continue to exist.

We recommend:

(1) That the Chicago Bar Association advise the Federal Judges of the Northern District of our views and request that the Rule be rescinded; and

(2) That the Judges be requested, prior to the adoption of any new local Rules, to make known the text of the proposed Rule and to give members of the Bar a

reasonable opportunity to express their views on such Rule.

Respectfully submitted,

SUBCOMMITTEE ON LOCAL RULE 22
/s/ Merrill A. Freed, Chairman
/s/ Edward R. Burr
/s/ Benjamin H. Cohen
/s/ Ronald M. Glink
/s/ Richard M. Kates

Letter from Chief Judge Robson of the District Court for the Northern District of Illinois to the President of the Chicago Bar Association, in response to the suggestion of the Bar Association in its Brief, that Civil Rule 22 of the District Court is incurably unconstitutional:

[Letterhead of]
UNITED STATES DISTRICT COURT
219 South Dearborn Street
Chicago, Illinois 60604

Chambers of
Chief Judge Edwin A. Robson

June 24, 1971

Mr. James A. Velde
President
The Chicago Bar Association
29 South LaSalle Street
Chicago, Illinois 60603

In re: Local Rule 22 of the United States District Court of Illinois.

Dear Mr. Velde:

I submitted your letter enclosing the report of the Federal Civil Procedure Committee pertaining to Local Rule 22 to our Judges for their consideration. As a result of your report, the Judges of our Court reexamined and amended the rule in question on June 15. A copy of the amended rule is enclosed. It is our opinion that this corrects a portion of the questions raised by the Committee. As to the other areas, we are of the opinion that the Committee misconceived the purpose of the rule and we are in substantial disagreement as to the constitutional questions.

As you will recall, a majority of the Federal Civil Procedure Committee of the Chicago Bar Association concluded Local Rule 22 to be incurably unconstitutional. The Committee report does not discuss basic contradictions peculiar to class action litigation, nor does it analyze relevant decisional authorities. Therefore, on behalf of the Court, I shall explain in some detail the rationale and constitutional basis of amended Local Rule 22.

I. *The Class Action Device**

The Supreme Court's revision in 1966 of Rule 23 of the Federal Rules of Civil Procedure substantially liberalized the class action device, which is now a species of litigation separate and distinct from the traditional lawsuit. In ordinary litigation, the attorneys normally represent specified clients who retained them. The typical class action, in contrast, is initiated by attorneys representing one or a few parties, who in turn purport to represent hundreds or thousands of absent class members that are nominal parties to the action. These absent class members are usually not contacted prior to filing the lawsuit and, in many instances, may not be consulted by anyone (the plaintiffs, the defendants, or the Court) until several months or years after the lawsuit is filed.

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* The discussion in Section I may seem elementary to those who are familiar with the class action device. Section I shows that (1) class actions create opportunities for serious abuse of the judicial process which are not normally present in routine litigation, (2) these potential abuses must, as a practical matter, be dealt with by rule rather than handled on a case-by-case basis, and (3) a rule requiring advance approval by the Court of communications with absent class members can be tailored specifically to protect against the abuses peculiar to class actions. Consequently, under the First Amendment authorities considered in Section II, such a rule would appear to be constitutionally permissible.

Rule 23 provides that, at some point in the litigation, the Court must determine whether the representative class members fairly and adequately represent the absent class members and, in most cases, must decide which of the absent class members should be properly included within the alleged class. Rule 23 further states that in most instances notice must be given to the absent class members, requesting them to indicate whether they wish to be included in the class. Rule 23 declares that the failure of an absent class member to respond to such a notice results in inclusion within the class.

As a consequence of the foregoing aspects of Rule 23 and other distinctive characteristics of class actions, communications in such suits from attorneys or representative class members to absent class members create opportunities for abuse of the judicial process not present in ordinary communications between an attorney and a client. As explained more fully in Sections 1.61 and 1.11 of the Manual on Complex and Multidistrict Litigation, these potential abuses, which may be unintentional, can be divided into two general categories: (a) solicitation of legal representation of absent class members and (b) misrepresentation or distortion of the status of the litigation.* See, for example, *Kronenberg* v. *Hotel Governor Clinton, Inc.*, 281 F.Supp. 622, 625 (S.D.N.Y. 1967), in which the absence of a rule similar to Local Rule 22 resulted in the attorneys for the plaintiffs sending an unauthorized communication to class members from which, according to that Court, "inferences . . . might easily be drawn . . . which do not reflect accurately the legal position of members of the class." The great potential for abuse is peculiar to

* Section 1.61 contains a fine discussion of the potential abuse of the class action which is not repeated in this letter.

class actions because in those cases, unlike traditional lawsuits, absent class members may not be aware of the lawsuit, the attorneys or the representative class members may wish to encourage absent members to participate in the lawsuit (for example, by sharing expenses), and the protagonists on both sides of the litigation will inevitably be affected by the absent class members' decisions to be included or excluded from the class. Thus, attorneys and parties in class actions have unusual incentives to communicate with absent class members. Unchecked communications with hundreds or thousands of potential clients or adversaries may, however, lead to potential abuse and thus threaten the integrity of the judicial process.

It is difficult, if not impossible, to deal with possible misuse of the class action device on a case-by-case basis since communications with absent class members often go undetected, especially if they are oral in nature. Moreover, it may not be possible to undo the effect of erroneous information or inaccurate statements communicated to class members, even if remedial communications are sent. An absent class member who is solicited may become a "satisfied" client or, is misled as to the nature of the litigation, the absent class member may refuse to read subsequent correspondence or my decide, once and for all, to opt in or out of the action. In *Siegel* v. *Chicken Delight, Inc.*, 271 F.Supp. 722 (N.D.Cal. 1967) and the Water Meter cases (*City of San Diego* v. *Rockwell Manufacturing Co., et al.*, No. C-50190-GHB and related cases (N.D.Cal. 1970)), the District Courts entered orders explicitly prohibiting parties and their counsel from independently contacting class members without prior court approval.

It would seem that the only effective way for the judiciary to cope with the potential abuses inherent in class actions is by a rule regulating the communications between

attorneys and representative parties, on the one hand, and absent class members on the other hand. It is eminently reasonable to require the substance of any such proposed communications to be submitted to the Court for approval prior to being transmitted to the absent class members, subject to the two qualifications discussed below in Section III.

II. *"Prior Restraints" and the First Amendment's Freedom of Speech*

The Chicago Bar Association's objection to Local Rule 22 is not justified by the cases it cites. While free speech may not be subjected to prior restraints in certain instances,* the decided cases clearly authorize prior restraints that are necessary to protect the integrity of the judicial process. As the Seventh Circuit recently declared in *Dorfman v. Meiszner*, 430 F.2d 558, 561 (7th Cir. 1970):

> "* * * [A] court may protect, by reasonable measures, the integrity of its proceedings from those interferences which may accompany the exercise of certain activities otherwise protected by the first amendment. *Sheppard* v. *Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); *Estes* v. *Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965); *Cox* v. *Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed. 2d 487 (1965)."

The preceding three Supreme Court decisions cited by the Court of Appeals are not considered by the Chicago Bar Association and, unlike the cases discussed in the Associa-

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* See, for example, the following decisions in which prior restraints on specified forms of speech were not permitted: *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175 (1968) (inflamatory speech); *Ginsberg* v. *City of Miami*, 307 F.Supp. 675 (S.D.Fla. 1969) (obscene speech); *Snyder* v. *Board of Trustees of University of Illinois*, 286 F.Supp. 927 (N.D.Ill. 1968) (subversive speech).

tion's report, are directly concerned with striking a balance between First Amendment rights and the protection of the judicial process.

More specifically, in both *Sheppard** and *Estes* the Supreme Court approved the insulation of jurors from news reports or analyses of the trial in which they were participating. Some limitation on speech was recognized as being essential to the judicial process and the right to a fair trial and the due process of law.** Similarly, in *Cox* v. *Louisiana*, 379 U.S. 559 (1965), the Supreme Court held that a statute prohibiting picketing or parading near a courthouse with the intent of obstructing justice was justified by a legitimate state interest in protecting its judicial process.***

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* In *Sheppard*, in addition to reversing a conviction because of excessive prejudicial publicity from which the jury was not insulated, the Supreme Court held that the trial court had a duty to control the release of information to the press, including a proscription against extrajudicial statements by lawyers, parties, witnesses and officials. Thus, the Court specifically approved a prior restraint on speech where required to afford a fair trial. 384 U.S. at 359, 361.

** The Chicago Bar Association cites *International Products Corp.* v. *Koons*, 325 F.2d 403, 408 (2d Cir. 1963), for the proposition that utilization of court processes may not justify a prior restraint on free speech. The Second Circuit, however, there upheld the District Court's order restraining a party from disclosing information gained from a deposition, clearly a prior restraint on that party's speech.

*** The Court stated that:

> "* * * [T]his statute on its face is a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and . . . the fact that free speech is intermingled with such conduct does not bring with it constitutional protection." 379 U.S. at 564.

Although the Chicago Bar Association relies extensively on language from *Dorfman* v. *Meiszner*, 430 F.2d 558 (7th Cir. 1970) (discussed above), its report overlooks the Seventh Circuit's recognition of the need to balance the various interests at stake. While the Court of Appeals in that case invalidated a few applications of Local Rule 34, the Court sustained the rule's underlying principle, explaining that:

> "* * * We think that the district court was acting within its discretion in prohibiting photographing and broadcasting inside as well as in the areas adjacent to the courtrooms. Moreover, the extension of the prohibition to the entire floor on which a courtroom is located, as well as the area surrounding the elevators on the first floor, is also permissible as a measure reasonably calculated to promote the integrity of the court's proceedings." 430 F.2d at 562.

The principle embodied in Local Rule 22, like that contained in Local Rule 34, merely subjects certain "speech" by attorneys and parties to reasonable regulation by the District Court. Rule 22 applies only to a limited group of communications, namely those in class actions, and its requirement of advance Court approval is tailored specifically to protect the integrity of the judicial process from the two potential abuses inherent in class suits: solicitation and misrepresentation. Subject to the qualifications discussed in Section III below, a very strong case can be made that Local Rule 22 satisfies all First Amendment guarantees.

III. *Amended Local Rule 22*

The major differences between Local Rule 22 as originally drafted and the amended rule suggested by the Judicial Panel are contained in the last paragraph of the latter rule, which states that:

> "This rule does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein."

Thus, amended Local Rule 22 authorizes, generally, (1) communications by an attorney with absent class members, if the client or prospective client initiated the communications or the representation by the attorney, and (2) communications occurring in the regular course of business of public officials, so long as the communications constitute neither solicitation nor misrepresentation.

While Sections I and II above suggest that the Court may adopt a rule regulating communications in class actions, in neither of the *two* situations described in the last paragraph of amended Local Rule 22 is there a serious potential for solicitation or misrepresentation. Since Local Rule 22, as originally drafted, required Court approval of *all* communications, including those in these two areas, the Rule might be vulnerable to attack in this regard. In the Water Meter cases* and in two petitions previously filed

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* For example, in the Water Meter cases one of the plaintiffs' attorneys declared,

> "I do not see why the Mayor of Philadelphia should not be free to discuss his case with the Governor of Pennsylvania if he so desires," and "it [the Rule] prohibits us from talking to our own clients who have already retained us . . . and who are members of the class. . . . It also prohibits us from talking to the class members who may initiate communications with us to ask us to represent them."

with the Seventh Circuit,* the parties' attacks on the local rule in question and a similar order of another Court focused squarely on one or both of these two vulnerable areas.

It is interesting to note that the Committee Report does not focus upon the two areas of the original rule which have been raised in the course of class action litigation. Instead, the report states that the original rule cannot be modified to save its constitutionality. Since no basis is stated for this drastic conclusion, the Court would refer the Committee to the decisions cited in Section II above.

In conclusion, our Court at all times desires to cooperate with the Bar. Our past efforts clearly indicate this. However, regarding the request that we submit all rules to the Committee in advance of any adoption by the Judges of

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*The Chicago Bar Association's report neglects to state that validity of Local Rule 22, *as originally drafted,* has been twice challenged in the United States Court of Appeals for the Seventh Circuit. In *Roger Boshes, et al.* v. *General Motors Corporation,* Nos. 18939 and 18940 (unreported decision dated February 12, 1971), Judges Kerner, Pell, and Stevens dismissed the appeals of class action plaintiffs to declare Local Rule 22 null and void, and to expunge an order based upon that rule. On March 10, 1971, Judges Kerner and Stevens denied the petition of the plaintiffs-appellants for rehearing, or, in the alternative, to vacate the order of dismissal and to file a new order stating the reasons for dismissal of the appeals.

The plaintiffs-appellants also filed an original petition for writs of mandamus and prohibition to direct Judge William J. Campbell to vacate the order entered pursuant to Local Rule 22. *Roger Boshes, et al.* v. *Honorable William J. Campbell,* No. 71-1104. This petition was also denied without an opinion on February 12, 1971. The subsequent petition for a rehearing was denied by Judges Kerner and Stevens on April 8, 1971. The Court is advised that a petition for certiorari has been filed with the Supreme Court in these matters.

the Court, they are of the opinion that this would not be feasible. Many of the rules that we adopt are at the direction of the Judicial Conference of the United States. Some are as a result of study by the Federal Center for Judicial Studies, and others are based on the recommendation of the committees of Judges. It is therefore the conclusion of the Judges of this Court that, under the circumstances, we cannot agree to submit our rules in advance of their adoption. However, if, after they are adopted, there are any suggestions or recommendations to be made by the Committee of the Bar Association, we would be glad to consider them.

I wish to thank you and the Committee on Federal Civil Procedure for its time and effort in preparing this report.

My kindest personal regards.

Yours truly,

/s/ Edwin A. Robson

Enclosure

ORDER*

IT IS HEREBY ORDERED that Rule 22 of the Civil Rules of this Court be, and the same is hereby amended to read as follows: RULE 22. For Prevention of Potential Abuse of Class Actions.

> In every potential and actual class action under Rule 23, F.R.Civ.P., all parties thereto and their counsel are hereby forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent of and approval of the communication by order of the Court. Any such proposed communication shall be presented to the

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* Note: In this letter from Judge Robson, the preamble to this order is omitted. It appears in the G.M. Brief, at p. 22. For convenience of reference, we repeat the preamble here:

> In accordance with the unanimous action of all of the Judges of this Court in executive session on June 15, 1971, this Court finds that class actions under Rule 23, Federal Rules of Civil Procedure, are subject to abuse, intentional and inadverent, unless procedures are devised and employed to anticipate abuse. Among the potential abuses of the class action processes are the following: (1) solicitation of direct legal representation of potential and actual class members who are not formal parties to the class action; (2) solicitation of funds and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (3) solicitation by formal parties of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23; and (4) unauthorized direct or indirect communications from counsel or a party, which may misrepresent the status, purposes and effects of the action and of Court orders therein, may confuse actual and potential class members, and create impressions which may reflect adversely on the Court or the administration of justice. To anticipate and prevent these abuses, this Court unanimously adopts the following order.

Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by the Court of the proposed communication and proposed addressees. The communications forbidden by this rule, include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses, from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F.R.Civ.P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the action, and of actual or potential Court orders therein, which may create impressions tending, without cause, to reflect adversely on any party, any counsel, the Court, or the administration of justice. The obligations and prohibitions of this rule are not exclusive. All other ethical, legal and equitable obligations are unaffected by this rule.

This rule does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

Enter:

For The Court
/s/ Edwin A. Robson
Chief Judge

June 15, 1971